

PROPOSED RESOLUTION

AGENDA ID #15004

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

WATER DIVISION

RESOLUTION W-5100

August 18, 2016

RESOLUTION

**(RES. W-5100) WENDELL WATER COMPANY. ORDER
AUTHORIZING WENDELL WATER COMPANY (WWC) TO BE
SOLD AND WENDELL LANE MUTUAL WATER COMPANY
(WLMWC), A NONPROFIT MUTUAL BENEFIT
CORPORATION, TO BUY WENDELL WATER COMPANY.**

SUMMARY

By Advice Letter (AL) 32-W filed on April 25, 2016, WWC, through its receiver, asks the Commission (1) to recognize Suzan Weese as WWC's owner; and (2) to authorize the sale of WWC to the Wendell Lane Mutual Water Company (WLMWC), a nonprofit mutual benefit corporation. On May 31, 2016, WWC and WLMWC executed a Water System Acquisition Agreement (Acquisition Agreement), which sets out the proposed terms and conditions for the sale.

As explained in this Resolution, the Commission is unable to recognize Suzan Weese as the owner since the owners as recognized by the Commission, Ewell Baker Jr. and Constance Baker (The Bakers), did not formally make a request of the Commission for a change of ownership as required by the Public Utilities (PU) Code¹. However, the Commission can grant the sale as requested because the Sonoma County Superior Court² (Court) has placed WWC under receivership. Consequently, it is the receiver³

¹ See, Sections 851-854 and Resolution ALJ-272, dated August 18, 2011.

² By order of the Sonoma County Superior Court dated October 3, 2007.

³ Charles Judson is the authorized agent for Weeks Drilling and Pump known as Weeks Drilling & Pumping Company.

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with the Court's authority that requests the sale of WWC to WLMWC. Therefore, the Commission grants WWC the authority to sell, and WLMWC the authority to buy, WWC under the terms and conditions set forth in the May 31, 2016, Acquisition Agreement between WWC and WLMWC.

This Resolution finds that the sale of WWC meets the ratepayer indifference test,⁴ the standard used by the Commission in the evaluation and approval of the sale and purchase of the Traver and Black Butte water utilities in Decisions (D.) 15-08-036 and D. 15-09-015, respectively.

The transfer of operations of WWC's water system is conditioned on WLMWC obtaining a domestic water supply permit (WSP) from the State Water Resources Control Board (SWRCB). Before the sale can become final, the Court must also approve the sale and relieve the receiver of its obligations. If the Court approves the sale, WLMWC, as a non-profit mutual water company, will be beyond this Commission's jurisdiction; thus, if the sale becomes final, WWC will no longer have any public utility obligations.

BACKGROUND

WWC serves twenty-five houses in a housing tract called Wendell Lane, in Sebastopol. WWC gets its water from a well and treats the water with chlorine. WWC stores the water in three 5,000 gallon steel storage tanks where the water levels rise and fall equally in all tanks. The water system also includes a 7.5 horsepower booster pump, four 80-gallon tanks, and one 81-gallon hydropneumatic tank that provide water service to the 25 customers. The last rate increase for WWC was adopted by Resolution W-4869, dated April 29, 2011.

The original owners of WWC were Ewell Baker Jr. and Constance Baker. On October 8, 1999, the Bakers purportedly sold WWC to Suzan Weese. Weese and the Bakers did not request the Commission's approval of the transfer, as is required by PU Code Section 851. Weese applied for and received a domestic WSP from the SWRCB on September 30, 1999, and she proceeded to operate the company for several years.

⁴ Under the ratepayer indifference test, any sale of a public utility should not have any net consequences that cause the ratepayer to prefer the seller to the buyer.

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In 2007, Weese informed the California Department of Public Health (DPH) that she would be moving to Arizona in October 2007, and would no longer be able to run the water system. Section 1166655 of the Health and Safety Code allows the DPH to petition the Superior Court to appoint a receiver if "the department determines that any public water system is unwilling or unable to adequately serve its users." DPH duly petitioned the Court to appoint a receiver to operate WWC, on October 3, 2007. The Court appointed Weeks Drilling & Pumping Company as receiver.

On April 25, 2016, WWC, acting through the receiver, filed AL 32-W, which asks the Commission (1) to recognize Weese as WWC's owner; and (2) to allow WLMWC to buy WWC.

The buyer, WLMWC, is a non-profit mutual benefit corporation incorporated on March 19, 2016, under the laws of the State of California. WLMWC seeks to acquire WWC because the 25 shareholders of WLMWC are customers of WWC without other sources of water. On May 31, 2016, WWC and WLMWC executed an Acquisition Agreement setting forth the proposed terms and conditions of the sale. The receiver has stated to Commission staff that WLMWC has retained the receiver, Weeks Drilling & Pumping Company, to operate the system after the sale.

NOTICE AND PROTEST

AL 32-W was served in accordance with General Order 96-B on April 19, 2016, to the City of Sebastopol, the SWRCB, WWC, nearby water companies, and persons on the general service list. No protests were filed.

DISCUSSION

When the Bakers purported to sell WWC to Weese in 1999, they did so without obtaining the Commission's prior approval. If a public utility sells any part of the property that it uses to serve the public without the Commission's approval, PU Code Section 851 provides that the sale is "void."

The word "void" has a specific legal meaning. According to Black's Law Dictionary, something that is void is "[o]f no legal effect; null", and the dictionary goes on to explain: "The distinction between *void* and *voidable* is often of great practical importance. Whenever technical accuracy is required, *void* can be properly applied only to those

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provisions that are of no effect whatsoever – those that are an absolute nullity."⁵ California law tracks the dictionary definition: the Court of Appeal has written that PU Code Section 851 "means what it plainly states, that a purported transfer in violation of the statute confers no rights on the transferee"⁶ That has a consequence here. AL 32-W asks us to recognize Weese as WWC's owner. We cannot. Legally, there is nothing to recognize. Because the 1999 sale was made without our prior authorization, it is nullity; it is as if it never happened. We have long recognized that "Section 851 declares an unauthorized sale *void*, and this Commission has consistently held that it has no power to retroactively validate such a transaction."⁷ The Bakers, therefore, remain the legal owners and Weese "obtained no greater rights than those of a vendee in possession under an unexecuted contract of sale; as regards the public utility obligations, [Weese was] nothing more than an agent of [the Bakers]."⁸ For Weese to be WWC's legal owner, Weese and the Bakers would first need to apply for permission to transfer the company under PU Code Sections 851 and 854, and would then need to re-execute the sale.

But that does not mean that we cannot now approve the sale of WWC to WLMWC. *Deus ex curia*, the Superior Court's October 2007 receivership Order saves us from having to untangle the knot of ownership. Under the supervision of the Superior Court that appointed them, receivers have the authority "to take and keep possession of the property . . . to make transfers, and generally to do such acts respecting the property as the court may authorize." Code Civ. Proc. § 568. In particular, receivers "may, pursuant to an order of the court, sell real or personal property in the receiver's possession" Code Civ. Proc. § 568.5. So, for purposes of this Resolution, it does not matter who *owns*

⁵ BLACK'S LAW DICTIONARY 1604 (8th ed. 2004) (emphasis in original).

⁶ *Slater v. Shell Oil Co.* (1940) 39 Cal.App.2d 535, 547; *accord Transport Clearings-Bay Area v. Simmonds* (1964) 226 Cal.App.2d 405, 419. *See also, e.g., Henderson v. Oroville-Wyandotte Irr. Dist.* (1931) 213 Cal. 514, 529-530 ("No sale of property burdened with a public use is legal, or of any validity whatever, unless the authority to make such sale is first given by the . . . Commission.").

⁷ *In re Bunnhausser* (1970) 70 CPUC 783, 784 (emphasis in original).

⁸ *Id.* at 785-786.

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WWC; what matters is that the receiver *controls* WWC and has the power to sell it, subject to the concurrent approval of this Commission and the Superior Court.

The receiver has been compensated during its operation of WWC. The compensation rate was approved by the Court. The SWRCB's Division of Drinking Water oversees the receiver. We further note that, through the Acquisition Agreement, WLMWC agrees to pay the \$7,500 purchase price to Weese, as the seller. Even though Weese is not WWC's legal owner, this is proper. We would expect the owner/operator receives compensation by management fees or operating expenses for running the company. The gains on sale of a water company reflect that the buyer has made an investment and thus should receive any gain on sale. We therefore proceed to analyze the proposed sale on its own terms.

Proposed water utility ownership changes are reviewed under PU Code Sections 851-854. As set forth in PU Code Section 851, and explained in Resolutions ALJ-186, ALJ-202, ALJ-244, and ALJ-272, we may review transfers of public utility property through the informal advice letter process, rather than through a formal proceeding, where the transaction is valued at less than five million dollars (\$5,000,000), is non-controversial and does not require environmental review under the California Environmental Quality Act (CEQA).⁹ Those conditions are met here: The proposed sale price is \$7,500; no one has protested the sale; and, as discussed further below, CEQA review is unnecessary.

The Commission requires a test of ratepayer indifference when evaluating the sale of a public utility and also requires the buyer to demonstrate that the buyer's acquisition of the public utility yields a tangible benefit to the ratepayer.¹⁰ Using the ratepayer indifference test to assess the sale of WWC, the Commission should evaluate several key metrics including: (1) service quality; (2) continuity of service; and (3) the impact of the purchase price on rate base. The Commission applied this standard of review in Del Oro Water Company's acquisition of Traver and Black Butte water utilities in D.15-08-036 and D.15-09-015, respectively. Most recently, the Commission applied this standard

⁹ PU Code Section 851 allows transfers or encumbrance of utility property for qualified transactions valued at five million (\$5,000,000) or less to be processed through an AL filing; ALJ-244, pg. 2.

¹⁰ See D.05-04-047 at 9-11; D.04-01-066 at 8-11; and D.01-09-057 at 26-28. These two tests are, at least arguably, mutually exclusive. Presumably ratepayers would not be "indifferent" to a deal that provides them with "tangible benefits." In some future formal proceeding, the Commission may want to reexamine its use of these two tests in tandem, but for now, we will continue to use both.

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in its approval of the sale and purchase of Beasore Meadows Water Company by Beasore Mutual Water Company in Resolution W-5091.

The Water Division therefore applied this standard in its evaluation of the proposed transfer of WWC as discussed below. We also assess whether the transaction requires compliance with CEQA, and whether any required approval from the SWRCB has been received when assessing whether a sale of a water utility should be authorized.

1. Service Quality

When she moved to Arizona, Weese became unable to operate WWC. By request of the DPH, the Court appointed a receiver on October 3, 2007, to operate WWC. The receiver has stated to Commission staff that WLMWC has retained the current receiver, Weeks Drilling & Pumping Company, to operate WWC after the sale. WLMWC will receive a domestic WSP as described in "PERMIT REQUIREMENT". Thus the service and water quality can be maintained without the expense of the appointed receiver. It is advantageous for the ratepayers of WWC to have the sale go into effect.

2. Continuity of Service

The Acquisition Agreement ensures an orderly water system transition and thereby offers continued water service by a responsible mutual board. As noted above, Weeks Drilling & Pumping Company will continue to operate the system on a day-to-day basis. Service will continue basically the same as it is now.

3. The impact of the purchase price on rate base

WLMWC is a mutual water company, which will, post-sale, deliver water to its customers at cost. PU Code § 2705.¹¹ That is, it will no longer have a rate base because it will no longer have rates. Apart from that: WLMWC is buying WWC as-is, free and clear of any encumbrances (other than the receivership), for \$7,500. The Acquisition Agreement states that service will otherwise continue the same as

¹¹ States the conditions for any corporation or association that is organized for the purposes of delivering water to its stockholders and members at cost is not a public utility. At "cost" means "without profit."

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before; WLMWC does not announce any plans to either expand or contract its plant in any meaningful way. Thus, even were WLMWC a for-profit water utility rather than a mutual water company, this transaction would not materially impact its rate base.

The Commission concludes that the proposed sale of WWC is reasonable, is in the public interest, and will provide tangible benefits to ratepayers. This includes continued provision of quality water service by a mutual board that has completed their investigation and due diligence prior to signing of the Acquisition Agreement and has hired the same operating company used by the receiver. Assuming the Court agrees with our conclusion, the sale of WWC will relieve WWC and the receiver of their duties to provide public utility water service to the customers of WWC. Accordingly, the receiver should seek the Superior Court's approval of this transaction. If the Superior Court approves the transaction, WWC shall file a Tier 1 advice letter with a copy of the Superior Court's Order attached. When we receive a copy of that Order, we will revoke WWC's Certificate of Public Convenience and Necessity and require WWC's current tariff sheets to be removed.

WLMWC is exempt from Commission regulations and jurisdiction per PU Code Section 2705, which states in part:

“Any corporation or association that is organized for the purpose of delivering water to its stockholders and members at costs ... is not a public utility, and is not subject to the jurisdiction, control, and regulation of the commission.”

WLMWC delivers water only to its members. WLMWC is a non-profit mutual benefit corporation and delivers water at cost.

CEQA REVIEW

CEQA review is not required by the proposed sale. CEQA applies to a “project or action which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change ... (and involves) the issuance to a person of a lease, permit, license, certificate, or entitlement for use by one

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or more public agencies. ¹² Pursuant to our review, we have determined that CEQA does not apply as this advice letter filing involves only a transfer and subsequent sale of ownership of the existing water facilities and no new construction or changes in the source of water supply are being proposed. There is no evidence of any other changes in the operation of WWC except a receiver is not required. Thus, approval of this advice letter is not a CEQA project and there is no possibility that the transaction may have any significant impact on the environment.¹³ As such, the approval of AL 32-W is exempt from CEQA.

PERMIT REQUIREMENT

Pursuant to the provisions of California Health and Safety Code Section 11625(a), any person or entity operating a public water system must have a permit to operate that system from the SWRCB. A change of ownership of a public health system requires the prospective new owner to apply and satisfy the SWRCB requirement that the new owner “possesses adequate financial, managerial, and technical capability to ensure the delivery of pure, wholesome, and potable drinking water.”¹⁴

Accordingly, in addition to the authorization from the Commission for the acquisition of WWC, the new owner must also apply for and receive a domestic WSP to operate WWC. WLMWC received notice from the SWRCB on January 5, 2016, that the WSP application is complete and has been accepted

CONCLUSION

Pursuant to PU Code Sections 851-854 and Resolution ALJ-272, we find the sale of WWC to WLMWC to be in the public interest. This application does not warrant disposition through a formal proceeding. This sale is approved pending Commission

¹² CEQA Guidelines, CALIFORNIA CODE OF REGULATIONS TITLE 14, Sections 15378(a) (2003)

¹³ CEQA Guidelines, CALIFORNIA CODE OF REGULATIONS TITLE 14, Section 15061(b)(3) “A project is exempt from CEQA if...it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment...”).

¹⁴ CH&S Code Section 116540(a).

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receipt of a copy of an order approving the sale from the Court, and a copy of the WSP to WLMWC.

COMPLIANCE

As noted in the Permit Requirement section, WLMWC received notice from the SWRCB on January 5, 2016, that the WSP application is complete and has been accepted. WWC has no outstanding compliance orders and the receiver for the utility has been filing annual reports as required.

PU Code Section 433(a), requires public utilities to pay an annual Public Utilities Reimbursement Fee (annual fee) to the Commission. Small water companies must also submit an Annual Fee Statement for the Commission Utilities Reimbursement Account, Water and Sewer System Corporations-Small Water Companies (statement). The Water Division has confirmed with the Commission's fiscal office that WWC has paid the required Commission reimbursement fee through December 31, 2015.

UTILITY SAFETY

As noted in the Compliance section of this Resolution, WLMWC is in compliance with the SWRCB's water quality standards for safe drinking water. There are no other safety issues.

COMMENTS

These are uncontested matters in which the Resolution grants the relief requested. Accordingly, pursuant to PU Code Section 311 (g) (2), the otherwise 30-day period for public review and comment is being waived.

FINDINGS AND CONCLUSIONS

1. Wendell Water Company (WWC), through its receiver, filed Advice Letter (AL) 32-W, asking that Suzan Weese be recognized as the owner of WWC. The original owners of WWC, Ewell Baker Jr. and Constance Baker, purportedly sold WWC to Weese in 1999. That transaction was never formally recognized by the Commission because the Bakers did not request the Commission's approval

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before selling WWC. Accordingly, that purchase is void under Public Utilities Code § 851. The Commission cannot retroactively approve a void transaction. Thus, the Commission cannot recognize Weese as the current owner.

2. WWC also requests by AL 32-W to sell WWC's water system and related assets to Wendell Lane Mutual Water Company (WLMWC). This sale meets the ratepayer indifference test standard in that WLMWC's customers will be unaffected in terms of service quality and continuity of service, and should be approved.
3. WWC and WLMWC agreed on a purchase price of \$7,500 for the WWC water system and related assets.
4. The sale of WWC does not have a material impact on the rate base of the utility, since WLMWC will not be using an established rate base amount to set the water service rates it will charge its members.
5. The California Environmental Quality Act does not apply as this AL only involves a change in control and operation of existing water facilities, and no new construction or proposed changes in the source of water supply.
6. The transfer of operations of WWC's water system to WLMWC should be conditioned on the receiver obtaining the approval of the Superior Court for Sonoma County, and on WLMWC obtaining the domestic water supply permit (WSP) required by the State Water Resources Control Board (SWRCB) to operate the water system under the new ownership.
7. WWC's Certificate of Public Convenience and Necessity should be revoked after the Superior Court approves the transfer, and after WLMWC obtains the domestic WSP to operate the water system.
8. WWC should file a Tier 1 AL with a copy of the Superior Court's order, and with a copy of WLMWC's domestic WSP, confirming the sale to WLMWC.
9. WWC has no outstanding compliance orders and the utility has been filing annual reports as required.

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10. WWC has paid the required Commission reimbursement fee through December 31, 2015.
11. WWC is in compliance with the SWRCB's water quality standards for safe drinking water. There are no other safety issues.
12. When WLMWC has the required authority to serve water to WWC's customers, WWC should no longer be required to provide regulated water service.
13. Pursuant to Public Utilities Code §§ 851-854, the sale of WWC to WLMWC is in the public interest and should be approved.

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THEREFORE, IT IS ORDERED THAT:

1. Pursuant to Public Utilities Code Sections 851-854 and Resolution ALJ-272, this Resolution grants authority to Wendell Water Company to sell and Wendell Lane Mutual Water Company to buy Wendell Water Company, under the terms and conditions set forth in the May 31, 2016, Water System Acquisition Agreement.
2. The transfer of operations of Wendell Water Company's water system to Wendell Lane Mutual Water Company is conditioned on Wendell Lane Mutual Water Company obtaining the required domestic water supply permit by the State Water Resources Control Board to operate the water system under the new ownership.
3. Wendell Water Company shall file a Tier 1 Advice Letter with a copy of an Order from the Superior Court of Sonoma County approving this transaction, and a copy of Wendell Lane Mutual Water Company's domestic water supply permit, in order for Wendell Water Company's Certificate of Public Convenience and Necessity to be revoked.
4. This resolution is effective today.

I certify that the forgoing Resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on August 18, 2016; the following Commissioners voted favorably thereon:

TIMOTHY J. SULLIVAN
Executive Director

**WENDELL WATER COMPANY
ADVICE LETTER NO. 32
SERVICE LIST**

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